A **RACHA URUD & ORS**

v.

RAVENSCOURT SDN BHD & ORS

B COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
HAMID SULTAN ABU BACKER JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: Q-01-122-03-2012]
C 20 DECEMBER 2013

CIVIL PROCEDURE: *Action - Commencement of - Claim under infringement of native customary rights - Whether should have been brought by way of judicial review - Whether based solely on substantive* D *principles of public law - Whether enforcement of native customary rights is preponderance of private rights - Rules of the High Court 1980, O. 53*

LIMITATION: *Accrual of cause of action - Fresh accrual of - Infringement of native customary rights - Terms in timber license granting* E *access to land - Whether no basis for complaint until operations entered land subject to NCR*

This was a case involving timber licences which invariably contained provisions to exclude areas under the native customary F rights ('NCR'). The appeal by the appellants were against the decision of the High Court which dismissed the appellants' writ of summons on the grounds, *inter alia*, that (i) the appellants' claims should be by way of judicial review and not by way of writ action and by filing a writ action, the appellants had abused the process G of the court; and (ii) there was delay on the part of the appellants in commencing the action and there was no explanation by the appellants for the delays. The appellants did not concede to the objection which was based on s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA') and further submitted that the H Director of Forests was negligent in the execution of his public duties and did not avail himself to be protected under s. 2(a) of the PAPA.

Held (allowing appeal; setting aside order of High Court)
I **Per Abdul Wahab Patail JCA delivering the judgment of the court:**

(1) Based on the decision in *Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors* ('*Litus Jau*'), it is clear that the issue as to whether the appellants' claim ought to have been brought

by way of judicial review rather than by a writ action is very much fact based. If the claim for infringement is based solely on substantive principles of public law, then the appropriate course would be by way of O. 53 of the Rules of the High Court 1980. What was at stake in cases that seek enforcement of NCR is preponderance of private rights as opposed to public rights. The respondents had abandoned the first ground of appeal after the decision of *Litus Jau*. (paras 1 & 11)

(2) The Judicial Commissioner had erred in dismissing the appellants' writ of summons by merely assuming that there was delay and on the basis that there was no explanation. It was unjust to assume the Director of Forests to be negligent as the issue of negligence involved adducing evidence to support and unless admitted, inevitably required a trial. The point certainly could not be dismissed summarily. (para 14)

(3) The terms in the timber licenses were between the licensor and the licensees and appeared to have nothing to do with the appellants. The terms meant that acting upon the licence granted, a licensee can enter upon the land which was the subject of the license. However, until his operations enter upon that part of land over which NCR is claimed, there would be no basis for complaint against the licensee. The fact that a complaint is made many months or years after entry into the licensed area is therefore irrelevant. Time limitation would not begin to run until the land subject to NCR is entered into. Thus, what was material was the date of entry upon the area upon which the NCR is claimed. (paras 24 & 25)

(4) While the interpretation of s. 2(a) of the PAPA is a question of law, the application of the section to hold whether a party is barred or not by the section is both a question of law as well as of fact. In this case, the law upon which s. 2(a) is sought to be applied pertains to a constitutional right and the facts relevant to the commencement of the breach had not been addressed. (para 26)

(5) It is trite that no person should be shut out from access to justice. No claim should be struck out or dismissed or allowed on summary grounds under affidavit based procedures unless it is a plain and obvious case. NCR claims, by their very nature, involve much disputed facts. Thus the courts must be

slow and may do so only for manifestly clear reasons, to dismiss or enter judgment summarily. There are issues of fact and law that required a full appreciation of facts in order to make a judicial decision that is fair and just according to law which is not possible by way of summary jurisdiction. (paras 27, 28 & 30)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah kes yang melibatkan lesen balak yang pada asasnya mengandungi peruntukan-peruntukan untuk mengecualikan kawasan-kawasan di bawah hak adat anak negeri ('HAAN'). Rayuan oleh perayu-perayu adalah terhadap keputusan Mahkamah Tinggi yang menolak writ saman perayu-perayu atas alasan-alasan, antara lain, bahawa (i) tuntutan perayu-perayu sepatutnya dibuat secara semakan kehakiman dan bukan melalui tindakan writ dan dengan memfailkan tindakan writ, perayu-perayu telah menyalahgunakan proses mahkamah; dan (ii) terdapat kelewatan pada pihak perayu-perayu dalam memulakan tindakan dan tidak ada penjelasan oleh perayu-perayu bagi kelewatan tersebut. Perayu-perayu tidak mengakui bantahan yang berdasarkan kepada s. 2 Akta Perlindungan Pihak Berkuasa Awam 1948 ('Akta') dan selanjutnya menghujahkan bahawa Pengarah Perhutanan telah cuai dalam pelaksanaan kewajipan awamnya dan tidak menggunakan perlindungan di bawah s. 2(a) Akta.

Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan keputusan dalam kes *Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors* (*'Litus Jau'*) adalah jelas bahawa isu sama ada tuntutan perayu-perayu wajar dimulakan secara semakan kehakiman dan bukan tindakan writ adalah bergantung kepada fakta. Jika tuntutan bagi pelanggaran adalah berdasarkan semata-mata atas prinsip substantif undang-undang awam, maka cara yang wajar adalah melalui A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980. Apa yang menjadi risiko dalam kes-kes yang meminta pelaksanaan HAAN adalah keutamaan hak persendirian berbanding dengan hak awam. Responden-responden telah mengabaikan alasan pertama selepas keputusan *Litus Jau*.

(2) Pesuruhjaya Kehakiman telah terkhilaf dalam menolak writ saman perayu-perayu dengan hanya menganggap bahawa terdapat kelewatan dan atas asas bahawa tidak ada penjelasan. Adalah tidak adil untuk membuat anggapan bahawa Pengarah Perhutanan cuai kerana isu kecuaian melibatkan pengemukaan keterangan sokongan dan kecuali diakui, sudah pasti memerlukan perbicaraan. Perkara tersebut jelas tidak boleh ditolak terus.

(3) Terma-terma dalam lesen pembalakan adalah di antara pemegang lesen dan penerima lesen dan jelas tidak melibatkan perayu-perayu. Terma-terma tersebut bermaksud bahawa bertindak atas lesen yang diberikan, seseorang pemegang lesen boleh memasuki tanah yang menjadi perkara lesen tersebut. Walau bagaimanapun, sehingga operasinya memasuki bahagian tanah di mana HAAN dituntut, tidak boleh ada asas bagi aduan terhadap penerima lesen. Fakta bahawa suatu aduan telah dibuat beberapa bulan atau tahun selepas memasuki kawasan lesen adalah dengan itu tidak relevan. Had masa tidak akan bermula sehingga tanah yang menjadi perkara HAAN dimasuki. Oleh itu, apa yang penting adalah tarikh kemasukan ke kawasan di mana HAAN dituntut.

(4) Sementara tafsiran s. 2 Akta adalah persoalan undang-undang, aplikasi seksyen tersebut untuk memutuskan sama ada sesuatu pihak dihalang atau tidak oleh seksyen tersebut adalah kedua-duanya persoalan undang-undang dan fakta. Dalam kes ini, undang-undang di mana s. 2(a) diminta untuk digunakan berkait dengan hak perlembagaan dan fakta-fakta relevan kepada permulaan pelanggaran tidak dipertimbangkan.

(5) Adalah matan bahawa tidak ada seorang pun dinafikan keadilan. Tiada tuntutan yang wajar dibatalkan atau ditolak atau dibenarkan atas alasan terus di bawah afidavit berdasarkan kepada prosedur kecuali ia adalah kes yang jelas. Tuntutan HAAN, dengan sendirinya, melibatkan fakta-fakta yang amat dipertikaikan. Oleh itu, mahkamah seharusnya tidak campur tangan dan hanya boleh berbuat demikian atas alasan-alasan yang jelas, untuk menolak atau memasukkan penghakiman secara terus. Terdapat isu-isu fakta dan undang-undang yang memerlukan pertimbangan penuh fakta-fakta untuk membuat keputusan kehakiman yang adil dan saksama menurut undang-undang yang tidak berkemungkinan melalui bidang kuasa terus.

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Cocks v. Thanet District Council [1982] 3 All ER 1135 ***(refd)***

Joseph v. Government of Sarawak & Anor [1975] 1 LNS 67 HC ***(refd)***

Lee Hock Ning v. Government of Malaysia [1972] 1 LNS 66 FC ***(refd)***

Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 CLJ 880 CA ***(foll)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

Nik Noorhafizi Nik Ibrahim v. PP [2014] 2 CLJ 273 CA ***(refd)***

O'Reilly v. Mackman [1982] 3 All ER 1124 ***(refd)***

Legislation referred to:

Federal Constitution, art. 160(2)

Public Authorities Protection Act 1948, s. 2(a)

Rules of the High Court 1980, O. 53

For the appellants - Simon Siah Sy Jen (Joshua P Baru with him); M/s Baru Bian & Co, Advocs

For the 1st respondent - Sim Hui Chuang (Lim Lip Sze with him); M/s Reddi & Co, Advocs

For the 3rd respondent - Leong Hsin Ru; M/s Tang & Partners, Advocs

For the 4th respondent - KY Lin; M/s Kadir Wong Lin & Co, Advocs

For the 5th & 6th respondents - JC Fong (Saferi Ali & Dayang Farzilla Awang Sabu with him); SCs, Sarawak State AG's Chambers

[Editor's note: For the High Court judgment, please see Racha Urud & Ors v. Ravenscourt Sdn Bhd & Ors [2012] 1 LNS 92.]

Reported by S Barathi

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellants appealed to this court against the decision of the High Court in Miri dismissing the appellants' writ of summons on the grounds, *inter alia*, that:

(a) The appellants' claims as plaintiffs should be by way of a judicial review and not by way of writ action, and by filing a writ action, the appellants had abused the process of the court; and

(b) There was delay on the part of the appellants in commencing the action and there was no explanation by the appellants for the delays.

The Judicial Review Ground

[2] The question whether the appellants' claim ought to have been brought by way of judicial review rather than by a writ action had been dealt with recently in the Court of Appeal in *Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd, Superintendent of Lands and Surveys Miri Division and the State Government of Sarawak* [2014] 1 CLJ 880. The Court of Appeal relied on the decision of the Federal Court in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 FC that whether a plaintiff ought to proceed under O. 53 of the Rules of the High Court 1980 for judicial review or to commence a civil suit by way of a writ action is very much fact based. It was held *inter alia* that if the claim for infringement is based solely on substantive principles of public law, then the appropriate course would be by way of O. 53, and concluded that much depends on the facts of the case.

[3] The decision in effect acknowledges that the affidavit based judicial review procedure saves time in question of law matters, but is less equipped to address matters involving disputed facts. Proceeding, in affidavit based applications, on the basis adopted in winding-up cases of setting aside all disputed facts and making a decision on the basis of the undisputed facts on the affidavits has the inherent flaw of enabling one party or the other to neutralise inconvenient facts by disputing them. That may be a risk necessarily adopted in companies' winding-up because of the urgency due to consequences emerging upon filing of the winding-up petition, thereby demanding an early disposal, and the risk may not necessarily be too high because a company should be able to quickly produce its financial records by affidavit.

[4] But the nature of cases of infringement of public law rights are such that cases involving purely questions of law and undisputed facts are rare. Where facts are disputed, getting the facts right necessarily require the crystallisation and notice process of pleadings, and the availability of the interrogatory and the discovery and production processes of the writ of summons procedure to enable the parties to check and verify the contradictory versions and thereby determine the facts. Used as

intended it is capable of satisfying the parties as to the inaccuracies of their versions. The role of the court, if dispute remains, is to examine the evidence gathered by the interrogatories, discovery and production, and if necessary to conduct a trial to assist that process of examination. All parties, including observers, can then be satisfied that the outcome is not a win or a loss as in a game, but is based on facts determined in accordance with law.

[5] This is particularly true in native customary rights claims cases due to the nature of the disputes of facts. In relation to this, His Lordship Richard Malanjum CJ (Sabah and Sarawak), in the Federal Court in *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Anor* [2011] 8 CLJ 766, had occasion to say:

> I would like to make another note on the use of Order 53 RHC 1980 in cases involving native customary rights … With respect, I find that it is highly unfair and prejudicial to insists upon the natives to proceed by way of Order 53 when they seek to enforce a constitutional right by way of a declaration to that effect.
>
> Although it does, to a certain extent fall within the realm of public law, I am of the view that it tilts more towards the vindication of a private right which is recognized both under statute and at common law(which pre-existed statute). As such, the natives should be at liberty to proceed by way of an ordinary civil suit. Another way of looking at it is to consider it as an exception to the *O'Reilly v. Mackman* [1982] 3 All ER 1124 principle.

[6] These exceptions to the *O'Reilly v. Mackman* [1982] 3 All ER 1124 principle emerge from the reasoning of Lord Diplock in *O'Reilly v. Mackman* of being concerned with the protection of the public authorities:

> It would ... as a general rule be contrary to public policy and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.

[7] The view expressed in *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Anor* was accepted in *Litus Jau & Anor* as having an important bearing in native customary rights cases.

[8] We think it worth recalling the speech of Lord Bridge of Harwich in *Cocks v. Thanet District Counci*l [1982] 3 All ER 1135 HL delivered shortly after the decision in *O'Reilly v. Mackman* that whether one could proceed under judicial review or a writ action arises from the court's jurisdiction to control its own procedure to prevent abuse and has nothing to do with any limitation on the jurisdiction of the court. Lord Diplock himself observed in *O'Reilly v. Mackman* that public law issues may arise collaterally in an ordinary action.

[9] Native customary rights claims are cases of a dispute between the private individual claiming a public law right and the public authority that refuses to recognise his right to it. The private individual is seeking not to nullify or challenge the public law on native rights but his case is about establishing the facts upon which he bases his claim to the particular native customary right claimed, and the defence on 16 May 2011 by the fifth and sixth respondents was to put the appellants on the factual parts of their claim to strict proof. The other respondents, being the various licensees, did similarly.

[10] We observe that putting the other party to strict proof does not alter the burden of proof that is upon a party that makes an assertion of fact upon which he relies, that is, to prove it upon a balance of probabilities.

[11] Learned counsel for respondent did agree that what was at stake in cases seeking enforcement of native customary rights are a preponderance of private rights as opposed to public rights. We are pleasantly encouraged that after *Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd, Superintendent of Lands and Surveys Miri Division and the State Government of Sarawak (supra)* contest upon this ground of appeal was abandoned by the respondents.

The Limitation Ground

[12] In particular, the licences were issued since 1985 but the plaintiffs only commenced civil suit in 2011. On the face of it, the objection was sustainable.

[13] We observe that the appellants herein did not concede to the objection which was based on s. 2(a) of the Public Authorities Protection Act 1948. Counsel for the appellants relied upon *Joseph v. Government of Sarawak & Anor* [1975] 1 LNS 67; [1975] 2 MLJ 38 and *Lee Hock Ning v. Government of Malaysia* [1972] 1 LNS 66;

[1972] 2 MLJ 12, and further submitted that the Director of Forests is negligent in the execution of his public duties and does not avail himself to be protected under s. 2(a).

[14] In our view, it is inherent to the challenge to the applicability of s. 2(a), in this case, of negligence on the part of the Director of Forests that it involves adducing evidence to support it. That, unless admitted, inevitably requires a trial. It is equally unjust to deny a plaintiff an opportunity to prove his case as it is to deny a defendant the opportunity to defend himself. Likewise, it is as equally unjust to assume the director was negligent as it would be to assume he was not negligent having it determined by a trial. Certainly the point cannot be dismissed summarily. In merely assuming there was a delay and on the basis there was no explanation, to dismiss the appellants writ of summons, the learned Judicial Commissioner had erred.

[15] Even if the above does not apply, the question of s. 2(a) and the lack of explanation for the delay needs to be considered.

[16] This was a case involving Timber Licence No. T/0294 issued on 28 January 1985, Licence for Planted Forest No. LPF/0027 issued 22 February 2004, Licence for Planted Forest No. LPF/0038 issued 12 June 2004, and Timber Licence No. T/9090 issued 1 December 2010. These licences were exhibited before the High Court. These licences invariably contain provisions to exclude areas under native customary rights. This is true in provisional leases of land also.

[17] The reason for these provisions is cloaked in the size, peoples, culture and history of Sarawak itself. It had always been difficult for the state of Sarawak to identify where all the native peoples are. The native peoples had varying cultures and rights. Their livelihood practices spanned hunting, fishing and food and produce gathering from the forests. While some are nomadic food gatherers within certain territories, others also clear areas for planting of crops, where they practice rotational as well as shifting agriculture. The legal history of Sarawak necessarily began with the recognition of the rights of the natives by James Brooke who came to Sarawak in his own ship, and whose influence was built upon making peace between warring communities and suppression of piracy for which he received support from the British Empire. Over time various orders were issued limiting various aspects of acquisition of native customary rights over land.

[18] The first observation is that the nature and extent of the native customary rights that can be acquired is dependent upon when it was first acquired.

[19] The second observation is that land in Sarawak is not state land until it is established it is not subject to a native customary rights claim.

[20] Because due to its size and the nature of the native customary rights that is recognised, it was and remains a daunting task to identify state land, ie, land free of native customary rights claim. For this reason, the approach of granting licences and leases to land "subject to native customary rights claims" was adopted.

[21] Hence, in respect of the Timber Licences T/0294 and T/9090, cl. 29 provided:

> 29. This Licence is granted without prejudice to
>
> (a) the exercise of any right admitted or privilege conceded to the natives under the Forests Ordinance;
>
> (b) the exercise of the eights specified in section 65 of the Forests Ordinance;
>
> (c) any act done with the permission in writing of, or in accordance with the terms of this licence issued under the authority of, the Director.

[22] In each case above, the Second Schedule provided that:

> Licensed Area
>
> (Clause 1)
>
> The licensed area is shown on Maps A and B of the First Schedule of the licence, but does not include:
>
> (i) alienated lands;
>
> (ii) gazetted communal reserves;
>
> (iii) land held under valid Temporary Occupation Licence;
>
> (iv) land subject to native Customary Rights.

[23] In respect of the Licences for Planted Forest LPF/0027 and LPF/0038, cl. 22 provided:

> 2(1) Nothing in this Licence shall be deemed to affect rights which any native has, prior to the issue of this Licence, lawfully acquired over the said land under the Land Code or

A the Ordinance. Such rights shall be referred to in this Licence as "native customary rights".

(2) It shall be duty of the Licensee, at his own costs and expense, to comply with the provisions of the Rules relating to the establishment of planted forests over lands subject to native customary rights claim.

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[24] We observe that these terms are between the licensor and the licensees, and appear to have nothing to do with the appellants. But it is by appreciation of what exactly was granted C under the licence would it be possible to determine when the breach of the appellants' NCR rights occurred insofar as it is relevant to the application of s. 2(a). We explain this as follows.

[25] The terms in the licences mean that acting upon the licence granted, a licensee can enter upon the land the subject of the D licence. But until his operations enters upon that part of land over which a native customary right is claimed, there would be no basis for complaint against the licensee. Depending upon where entry and operations are commenced, that entry upon land subject to a native customary right could happen on the first day of entry or E many months, even years later. The fact that a complaint is made many months or years after entry into the licensed area is therefore irrelevant. Time limitation would not begin to run until land subject to a native customary right is entered into. Thus, what is material is the date of entry upon the area upon which F the native customary right is claimed. Indeed, a claimant's slowness to commence legal action may testify well of the *bona fides* of their claim, in that they did not object until their rights were breached.

G **[26]** We further observe that while interpretation of s. 2(a) is a question of law, the application of the section to hold whether a party is barred or not by the section is both a question of law as well as of fact. In this case:

H (a) the law upon which s. 2(a) is sought to be applied pertains to a constitutional right; and

(b) the facts relevant to the commencement of the breach had not been addressed.

I **Our Conclusion**

[27] The basis of summary jurisdiction was explained in *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182; [1987] 2 MLJ 183 SC. It is trite that no

person should be shut out from access to justice. No claim should be struck out or dismissed or allowed on summary grounds under affidavit based procedures unless it is a plain and obvious case. This occurs only where the issue is purely a question of law or interpretation, and the facts based upon which the question of law or interpretation arose are not disputed. This is true also where the facts relevant to the question whether limitation applies are disputed. To deny any party the right to be heard in a court of justice to establish the facts and for a judgement made on the facts, is a denial of the fundamental elements of a fair and just decision. Courts must therefore be slow to do so.

[28] Native customary rights claims by their very nature involve much disputed facts. Yet on the one hand, if their claim of NCR is right, it is clearly a matter of a constitutional right. Under such circumstances, to deny it, is a denial of their constitutional right. The reality today is that the native is unlikely to be able to find and establish NCR on another piece of land on the same terms as they had before. On the other hand, there is the valid concern of the Government as the trustee of the state, arising out of its position as the custodian of the executive powers of the state of Sarawak that recognised NCR as a right of the native peoples of the state, is that the claim that is made is not a false and opportunistic claim. Given these considerations, the courts must be even more slow, and may do so only for manifestly clear reasons, to dismiss or enter judgment summarily.

[29] In the foregoing, we made distinctions between the state of Sarawak, the Government of the state of Sarawak who is the custodian of its executive powers, and the executive officers of the Government. We make the further observation that when it relates to public law remedies, the distinction between the doctrines of parliamentary supremacy and of constitutional supremacy must be borne in mind. Without a written constitution, English cases on public law remedies are confined to the doctrine of parliamentary supremacy are not applicable *per se* when the relevant declaration sought raises constitutional issues under a written constitution. (See art. 160(2) of the Federal Constitution). Since English cases on public law remedies are confined to the doctrine of parliamentary supremacy, O. 53 and its time frame are seen to be the procedural mechanism to challenge the decision of public authorities. Where the doctrine of constitutional supremacy applies and the action (whether public and/or private law remedy)

A is related to constitutional rights, O. 53 or its time frame cannot be the sole criteria. It may also be observed that Limitation Act or similar limitation provisions in contract or tort or trust, etc., deal with personal rights *inter se*, but cannot apply to a breach of constitutional rights which is a continuing breach. See *Nik*
B *Noorhafizi bin Nik Ibrahim v. PP* [2014] 2 CLJ 273; [2013] 4 AMR 854.

[30] There are, therefore, issues of fact and of law that require a full appreciation of the facts in order to make a judicial decision
C that is fair and just according to law. It is not possible by way of summary jurisdiction.

[31] Accordingly we allow the appeal, set aside the order of the High Court, and order that the costs below and of this appeal to follow the final outcome of the writ action. The costs of this
D appeal is fixed at total RM10,000 with each set of respondent(s) to receive or pay RM2,000 upon their success or loss respectively.

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